

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In The Matter of

IMPLEMENTATION OF THE  
TELECOMMUNICATIONS ACT OF 1996:

TELECOMMUNICATIONS CARRIERS'  
USE OF CUSTOMER PROPRIETARY  
NETWORK AND OTHER CUSTOMER  
INFORMATION

CC Docket No. 96-115

**RESPONSES OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.1415, hereby responds to selected questions posed by the Common Carrier Bureau ("Bureau") in Public Notice, DA 97-385 (released February 20, 1997), issued in the captioned docket ("Notice"). The inquiries presented by the Bureau in the Notice all involve the interplay between Section 222 of the Communications Act of 1934 ("Communications Act"),<sup>1</sup> as amended by Section 702 of the Telecommunications Act of 1996 ("1996 Act"),<sup>2</sup> on the one hand, and Sections 272 and 274 of the Act, as amended by Section 151 of the 1996 Act, on the other hand.<sup>3</sup> Consistent with its

<sup>1</sup> 47 U.S.C. § 222.

<sup>2</sup> Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

<sup>3</sup> 47 U.S.C. §§ 272, 274.

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focus in earlier-filed comments and reply comments submitted in response to the Notice of Proposed Rulemaking, FCC 96-221 (released May 17, 1996) (the "NPRM") in this rulemaking proceeding,<sup>4</sup> TRA will here address only the Bureau's questions involving the interrelationship between the protections of carrier and customer proprietary network information ("CPNI") embodied in Section 222 and the structural, transactional, nondiscrimination and other safeguards imposed by Section 272 on Bell Operating Company ("BOC") provision of "in-region," interLATA telecommunications and information services.

The pertinent Bureau questions and TRA's responses thereto are set forth below:

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<sup>4</sup> Comments of the Telecommunications Resellers Association filed in CC Docket No. 96-115 on June 11, 1996; Reply Comments of the Telecommunications Resellers Association filed in CC Docket No. 96-115 on June 26, 1996

1. Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 'affiliate and any other entity in the provision or procurement of . . . services . . . and information . . . ' mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

TRA agrees with the Commission that "Congress sought to address both privacy and competitive concerns by enacting Section 222."<sup>5</sup> As the Joint Explanatory Statement notes, "new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI."<sup>6</sup> TRA submits that the answer to Question No. 1 produced by a meaningful balancing of competitive and consumer privacy concerns depends in large part on the meaning attributed to Section 222(c)(1)'s reference to "the approval of the customer." If "the approval of the customer" is deemed to mean the customer's affirmative written consent, consumer privacy concerns dictate that use and disclosure of, and access to, CPNI should be limited to the entity that has secured such affirmative written consent. If, on the other hand, "the approval of the customer" is deemed to mean oral consent or "opt-out," or other more relaxed, approval, than competitive concerns require that a BOC must share with other entities such CPNI as is used, disclosed to or accessed by its Section 272 affiliate.

In the former circumstance, the customer has made an affirmative decision to permit focused disclosure of its CPNI; in the latter circumstance, the customer has indicated that it has no particular interest in the confidentiality of its CPNI. In the former circumstance, the BOC has persuaded the customer that it is in the customer's best interest to permit the BOC to

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<sup>5</sup> NPRM, FCC 96-221 at ¶ 15.

<sup>6</sup> S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 205 (1996) ("Joint Explanatory Statement").

share the customer's CPNI with the BOC's Section 272 affiliate; in the latter circumstance, the BOC is simply better positioned to take advantage of CPNI as to which the customer has exhibited no confidentiality concerns. When a customer makes an implicit judgment to permit only limited disclosure of its CPNI, that decision should be honored. When the customer essentially makes no judgment with respect to the confidentiality of its CPNI, a BOC should not derive any greater benefit from that lack of concern than its competitors.

**2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's 'affirmative written request' under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?**

Yes! Under Section 222(c)(1), a telecommunications carrier may use, disclose or permit access to CPNI received or obtained from a customer only in the provision of the service as to which that CPNI relates (as well as certain other services ancillary thereto). A BOC, accordingly, may not disclose a customer's CPNI to a Section 272 affiliate engaged in a service other than the service from which the CPNI was derived without the customer's affirmative written consent. Certainly, a BOC could not disclose a customer's CPNI to an unaffiliated interexchange carrier ("IXC"). And, if the BOC may not discriminate between its Section 272 affiliate and that unaffiliated IXC in the provision of services and information under Section 272(c)(1), it cannot share a customer's CPNI with its Section 272 affiliate in the absence of the customer's affirmative written consent.

To hold otherwise would be inconsistent with both the 1996 Act's nondiscrimination and customer privacy safeguards. Under Section 222(c)(1), a customer has a reasonable expectation that its CPNI will not be used to provide or market any service other than the service from which that information was derived. Under Section 272(c)(1), a competitor has a reasonable expectation that a BOC will not discriminate against it in favor of the BOC's Section 272 affiliate. If a BOC could disclose CPNI to a Section 272 affiliate without obtaining the customer's affirmative written consent and without sharing that same information with competitors, both of these expectations would prove groundless.

Accordingly, it goes without saying that a BOC must secure the affirmative written consent of a customer before sharing that customer's CPNI with its Section 272 affiliate. As noted above, however, if a customer's affirmative written consent is required before CPNI can be disclosed, Section 272(c)(1), in TRA's view, would not require a BOC to share with competitors CPNI as to which a customer had made the decision in that instance to allow only the BOC to use.

**3. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's 'affirmative written request' under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? Must the answer to this question be the same as the answer to question 2.**

TRA submits that given that its response to Question No. 2, above, is predicated equally on the independent mandates of Sections 222(c)(1) and 272(c)(1), that answer applies with equal force to all telecommunications carriers, including IXCs, independent local exchange carriers ("IndLECs") and competitive local exchange carriers ("CLECs"). As noted above, if a customer is required to indicate in writing its authorization to disclose its CPNI, customer privacy concerns dictate that that information should be shared only with the specific subject of the authorization. The sole distinctions between TRA's answer to Bureau Question Nos. 2 and 3 is that an affiliate of a telecommunications carrier other than a BOC would be able to share a customer's CPNI with an affiliate or another intra-company operating unit if such affiliate or operating unit was involved in the provision of the service from which the CPNI was derived, whereas a BOC could not share such information with a Section 272 affiliate. The distinction arises out of the applicability of Section 222(c)(1) to all telecommunications carriers and the applicability of Section 272(c)(1) only to BOCs.

4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate? If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose (i.e., opt-out approval), is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

Yes! Section 272(c)(1) makes crystal clear that a BOC may not discriminate between a Section 272 affiliate and any other entity in the provision of information or services. Application by a BOC of one CPNI disclosure standard to a Section 272 affiliate and a different CPNI disclosure standard to a competitor would constitute blatant discrimination. As the Commission has noted, "the prohibition against discrimination in section 272(c)(1) means, at a minimum, that BOCs must treat all other entities in the same manner as they treat their section 272 affiliates, and must provide and procure goods, services, facilities, and information to and from these other entities under the same terms, conditions, and rates."<sup>7</sup> If a competitor is held to a stricter CPNI disclosure standard than a BOC Section 272 affiliate, there is no equality of treatment.

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<sup>7</sup> Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, CC Docket No. 96-149, FCC 96-489, ¶ 198 (released December 24, 1996), *pet. for rev. pending sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Jan. 31, 1997), *recon. pending* ("Non-Accounting Safeguards Order").



5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier, including interexchange carriers and independent LECs, disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?

Telecommunications carriers other than BOCs are not bound by the non-discrimination requirements of Section 272(c)(1). While all telecommunications carriers are subject to the non-discrimination requirements of Section 202(a),<sup>8</sup> use, disclosure and access to CPNI are not common carrier services to which Section 202(a) applies. Accordingly, telecommunications carriers other than BOCs are not required to disclose a customer's CPNI to unaffiliated entities under the same standard for customer approval applied in connection with their affiliates and other intra-company operating units.

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<sup>8</sup> 47 U.S.C. § 218.

6. **Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities when it provides such a service for its section 272 affiliate? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate over unaffiliated entities? If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?**

Section 272(c)(1) "extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate."<sup>9</sup> The Commission expressly rejected any number of proposals to narrow this broad application, including efforts to restrict Section 272(c)(1)'s non-discrimination requirements to "telecommunications-related," or even "common carrier-related," goods, services, facilities and information.<sup>10</sup> And the Commission emphasized this view by stating its intention in enforcing the non-discrimination requirement of Section 272(c)(1) to construe "broadly" the terms good, service, facility and information, to "prevent BOCs from discriminating unlawfully in favor of their section 272 affiliates."<sup>11</sup> As to "information" in particular, the Commission found "no limitation in the statutory language on the type of information that is subject to the section 272(c)(1) nondiscrimination requirement;" indeed, the Commission expressly concluded that CPNI is included among the information to which the section 272(c)(1) nondiscrimination requirement applies."<sup>12</sup>

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<sup>9</sup> Non-Accounting Safeguards Order, FCC 96-489 at ¶ 218.

<sup>10</sup> Id. at ¶ 217.

<sup>11</sup> Id. at ¶ 216.

<sup>12</sup> Id. at ¶ 222.

Given the breadth of Section 272(c)(1)'s non-discrimination requirements, TRA submits that in the event a BOC solicits customer approvals of CPNI disclosures on behalf of a Section 272 affiliate, it is incumbent upon that BOC to offer a like "approval solicitation service" to other telecommunications carriers. Failure to do so would constitute blatant (and unlawful) discrimination. Ensuring that any such "approval solicitation service" does not favor the BOC's Section 272 affiliate raises the same questions the Commission confronted in addressing the obligation of all incumbent local exchange carriers ("ILECs") to provide non-discriminatory provision of operations support services. There, the Commission held that the operations support services an ILEC must provide to CLECs must be "at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users."<sup>13</sup>

While this standard is necessarily nebulous, it suggests certain practical elements. Thus, a requirement that "approval solicitation services" be at least equal in quality to those provided to a BOC Section 272 affiliate would by necessity require a comparable script, like incentives for the soliciting personnel, identical personnel requirements and training and so forth. Certainly, the incentives to favor the BOC Section 272 affiliate would be strong, but performance criteria and reporting requirements would go a long way in blunting these incentives. Thus, if a BOC was achieving a success rate of 95 percent for its Section 272 affiliate and 45 percent for others, warning bells would sound.

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<sup>13</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 970 (released August 8, 1996), *pet. for rev. pending sub nom. Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996) ("Local Competition First Report and Order").

Finally, it restates the obvious to assert that in order to satisfy Section 272(c)(1), any such "approval solicitation service" and associated access to CPNI must be made available to competitors on terms and conditions and at rates equal to those offered to a BOC's Section 272 affiliate.

7. If under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission to access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)? What specific obligations with respect to the use, disclosure, and permission to access to CPNI do sections 222(c)(1) and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?

Bureau Question No. 7, in TRA's view, attaches an unduly expensive meaning to the terms "marketing" and "sales." While the Commission has concluded that "activities such as customer inquiries, sales functions, and ordering appear to involve only the marketing and sale of a section 272 affiliates services," the scope of marketing and sales is not unlimited.<sup>14</sup> Providing for use, disclosure and/or access to CPNI may impact the success of a marketing effort, but it is not part of that undertaking. Likewise, solicitation of customer approval of CPNI disclosure may be a preliminary exercise in preparing a marketing campaign, but it is an independent activity. As the Commission has found, such preparatory undertakings as "planning, design, and development of a section 272 affiliate's offerings" do not constitute sales and marketing.<sup>15</sup> Accordingly, the section 272(g)(3) exemption of the marketing and sales activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1) has no pertinence to CPNI disclosure.

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<sup>14</sup> Non-Accounting Safeguards Order, FCC 96-489 at ¶ 296.

<sup>15</sup> Id.

**8. To what extent is soliciting customer approval to the use, disclosure, or permit access to CPNI an activity described in section 272(g)? To the extent that a party claims that CPNI is essential for a BOC or a section 272 affiliate to engage in any of the activities described in section 272(g), please describe in detail the basis for that position. To the extent that a party claims that CPNI is not essential for a BOC or a section 272 affiliate to engage in those activities, please describe in detail the basis for that position.**

As discussed in response to Bureau Question No. 7, TRA does not believe that soliciting customer approval of the use and/or disclosure of CPNI is an activity encompassed within the scope of Section 272(g); like strategic planning, such undertakings may facilitate marketing success, but are not part of the sales activity. The inquiry as to whether or not CPNI is essential to marketing and sales, therefore, misses the mark. Can a sale be closed without access to a customer's CPNI? Of course! Is access to a customer's CPNI helpful in making a sale? Without question? But neither concept is relevant to the scope of the Section 272(g)(3) exemption from Section 272(c)(1)'s non-discrimination requirements. Section 272(g)(3) exempts "marketing and sale of services;" it does not exempt all activities which may impact upon marketing and sales activities. A good product, excellent customer service, network reliability and the like all facilitate successful marketing and sales, but none are exempt from Section 272(c)(1)'s non-discrimination requirements because such an approach would have the exception subsume the rule.

9. Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services . . . concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any . . . services . . . or information concerning its provision of exchange access to [its affiliate] unless such services . . . or information are made available to other providers of interLATA services in that market on the same terms and conditions"?

Section 272(e)(2), by its terms, applies to all facilities, services and information involved in the provision of exchange access. As such, Section 272(e)(2) applies to CPNI derived from the provision of exchange access services and to "approval solicitation services" associated with such CPNI. As acknowledged by the Commission, however, the protections embodied in Section 272(e)(2) tend to reinforce other safeguards, such as those set forth in Section 272(c)(1).<sup>16</sup> Accordingly, while Section 272(e)(2) applies to BOC treatment of CPNI, compliance with the requirements of Section 272(e)(2) is assured if the BOC satisfies its obligations under Section 272(c)(1).

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<sup>16</sup> *Id.* at ¶ 251.

10. Does a BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a "transaction" under section 272(b)(5)? If so, what steps, if any, must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?

Yes. Any action undertaken by a BOC on behalf of a Section 272 affiliate constitutes a "transaction" under Section 272(b)(5). Accordingly, all requirements applicable to such transactions generally are applicable to activities engaged in by BOCs on behalf of their Section 272 affiliates to secure customer approval of use and disclosure of or access to CPNI. The Commission has defined the term "transaction" broadly, concluding for example that "the sharing of in-house services by a BOC and its section 272 affiliate constitutes a 'transaction' within the meaning of section 272(b)(5)."<sup>17</sup> Because activities engaged in by BOCs to secure for their Section 272 affiliates customer approval of use and disclosure of or access to CPNI are transactions, they are subject to the Commission's affiliate transaction rules, as amended and set forth in the Commission's Accounting Safeguards Order at Section IV(B)(1)(b), and must be reduced to writing and made available for public inspection in accordance with Section 272(b)(5).

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<sup>17</sup> Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, FCC 96-490, ¶ 182 (released December 24, 1996), *recon. pending* ("Accounting Safeguards Order").



## **CONCLUSION**

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with the above responses.

Respectfully submitted,

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